DOCUMENT RESUME

ED 253 928 EA 017 502

AUTHOR Beckham, Joseph C.
TITLE Employees.
PUB DATE 84
NOTE 37p.; Chapter 2 of: The Yearbook of School Law, 1984 (EA 017 500).
PUB TYPE Books (010) -- Information Analyses (070) -- Legal/Legislative/Regulatory Materials (090)

EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS Administrators; Civil Liberties; Civil Rights; Contracts; *Court Litigation; Dismissal (Personnel); Due Process; Elementary Secondary Education; Employer Employee Relationship; Equal Opportunities (Jobs); Federal Courts; Government Employees; *Labor Relations; Legal Responsibility; Public Education; Reduction in Force; *School Law; School Personnel; State Courts; Teacher Certification; Teacher Discipline; *Teacher Employment; Teachers; Tenure
IDENTIFIERS First Amendment

ABSTRACT

Decisions made by federal and state courts during 1983 concerning the employment, dismissal, and tenuring of the employees of public agencies--in particular, public schools--are reported in this chapter. The chapter first addresses discrimination in employment based on race, sex, age, or physical limitations and notes that the shifting burden of proof in discrimination cases involving alleged violation of federal statutes continues to dominate litigation in the public employment sector. Considered next are cases involving employees' rights to freedom of speech and association, the most frequently pressed substantive constitutional claims in cases involving adverse employment decisions. Other topics covered include the application of procedural due process in cases involving employees; the dismissal and discipline of employees for insubordination, unacceptable conduct, or incompetence; the application of acceptable procedures during reductions in force; disputes over contract provisions; factors affecting tenure; and teacher certification and decertification. (PGD)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

X This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

"PERMISSION TO REPRODUCE THIS MATERIAL IN MICROFICHE ONLY HAS BEEN GRANTED BY

T. Jones

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

ED253928

2

EMPLOYEES

Joseph C. Beckham

Introduction 2.0
Discrimination in Employment 2.1
- Race 2.1a
- Sex 2.1b
- Age 2.1c
- Handicap 2.1d

Substantive Constitutional Rights 2.2
- Speech and Association 2.2a
- Religion 2.2b

Procedural Due Process 2.3
- Property Interest 2.3a
- Liberty Interest 2.3b
- Aspects of Notice 2.3c
- Aspects of Hearing 2.3d

Dismissal and Discipline 2.4
- Insubordination 2.4a
- Unprofessional Conduct, Immorality, or Unfitness 2.4b
- Incompetency and Persistent Negligence 2.4c

Reduction in Force and Abolition of Position 2.5
- Necessity for Reduction in Force 2.5a
- Elimination of Position 2.5b
- Selection of Employee 2.5c
- Seniority and Reassignment 2.5d

Contractual Disputes 2.6
- Contract Provisions and Board Policies 2.6a
- Administrative Regulations and State Statutory Provisions 2.6b

Tenure 2.7
- Probationary Period 2.7a
- Tenure by Default or Acquiescence 2.7b
- Tenure Status 2.7c

Certification 2.8
- Certification Standards 2.8a
- Decertification, Revocation, or Suspension 2.8b

EA 017 502

2.0 INTRODUCTION

Cases selected for inclusion in this chapter involve public school employees or local, state, or federal education agencies as principal parties and do not include employment issues in the private sector. The analysis specifically excludes consideration of cases involving unemployment or workers' compensation, retirement, or pensions and benefits. Further, issues related to liability under section 1983 of the Civil Rights Act of 1964 are dealt with in another chapter of the *Yearbook*.

2.1 DISCRIMINATION IN EMPLOYMENT

The shifting burden of proof in discrimination cases involving alleged violation of federal statute law continues to dominate litigation in the public employment sector. While appellate decisions often deal with federal constitutional questions as well, the predominant issues in current discrimination suits deal with provisions of Title VII and section 1983 of the Civil Rights Act of 1964, section 504 of the Rehabilitation Act of 1973, and the Age Discrimination in Employment Act.

2.1a Race

In a case that presents the issue of a federal court's authority to impose a racial quota for the hiring of black teachers once a constitutional violation of equal protection of the laws has been found, the Sixth Circuit Court of Appeals has struck down an order of the federal district court that imposed a racial quota on a school district's teaching staff and nullified contractual seniority rights. In considering the issue, the circuit court balanced the interests of students in correcting past discriminatory practices against what was characterized as the "strong expectations of teachers" relying on contractual seniority rights. While the court recognized that a desegregation remedy might require a quota in hiring where the evidence of discrimination was sufficiently egregious, it held that under the circumstances of this case the school district's good faith efforts to comply with an affirmative action plan in new hirings and to actively recruit black faculty over a ten-year period were sufficient. Further, the circuit court held as a matter of law that the evidence did not justify the nullification of seniority rights to vindicate student constitutional rights when the projected percentage of black faculty after seniority based layoffs would be comparable to a number of relevant market statistical indicators defining black participation in the labor market.[1]

1. Oliver v. Kalamazoo Bd. of Educ., 706 F.2d 757 (6th Cir. 1983).

In an employment discrimination action, a school district's use of a quota system for hiring black staff was successfully challenged. A quota system under which each school was required to employ between 75 percent and 125 percent of the existing proportion of black teachers employed citywide at that school's respective level in the school system was held to violate equal protection and the Civil Rights Act. The quota system was used to maintain faculty racial balance after the school faculties were successfully integrated, but the district failed to show that the system would revert back to prior levels of segregation if the quota system was not maintained.[2]

The imposition of a "one-to-one" minority hiring goal and an order specifying that future layoffs be made on a percentage basis to guarantee maintenance of ratios of minority to majority teachers has been approved by the Second Circuit Court of Appeals. That such a mandate would infringe on the contractual rights of majority teachers did not render the plan invalid, though the court did review and reverse aspects of the hiring goals that were considered unduly harsh in application to probationary and permanent teachers.[3]

A history of de jure discriminatory practices, statistical evidence of disparate employment practices, and subjective hiring standards in selection processes have been held sufficient to compel a finding of employment discrimination as to a black Alabama teacher-coach who was denied a position as head coach. The coach's Title VII claim, once established, was not sufficiently refuted by the school board's assumption that the teacher-coach was not interested in applying for the position, because the selection process utilized by the board lacked proper notice and uniform selection criteria.[4]

A black female applicant who qualified for a position as a special education supervisor was denied the opportunity to interview for the position. A Pennsylvania appellate court sustained the findings of a state administrative board that the district's failure to interview the candidate constituted unlawful sex and race discrimination and the district's reasons for failing to hire were a pretext for unlawful discrimination.[5]

In a case that initially arose under the rigorous standards of judicial review established under the *Singleton*[6] standard, the Fifth Circuit

---

2. Kromnick v. School Dist. of Philadelphia, 555 F. Supp. 249 (E.D. Pa. 1983).

3. Arthur v. Nyquist, 712 F.2d 816 (2d Cir. 1983). *See* Tasby v. Wright, 713 F.2d 90 (5th Cir. 1983). The Fifth Circuit found no error in a district court's revision of minority hiring goals that were reasonably related to the ultimate objective of eliminating the vestiges of past racial discrimination.

4. Harris v. Birmingham Bd. of Educ., 712 F.2d 1377 (11th Cir. 1983).

5. Harrisburg School Dist. v. Pennsylvania, 446 A.2d 720 (Pa. Commw. Ct. 1983).

6. *See* Singleton v. Jackson Mun. Sep. School Dist., 419 F.2d 1211 (5th Cir. 1969).

Court of Appeals reviewed a decision in which a black football coach was demoted to a position as assistant coach during unification of a previously segregated school system and later passed over for promotion during the implementation of a desegregation plan. The appellate court held the coach had failed to establish any violation of his civil rights in the employment decisions of the school district during the desegregation period.[7]

A South Carolina federal district court's reliance on the burden of proof in Title VII cases was considered misplaced by the Fourth Circuit Court of Appeals. The plaintiff, a black school principal, challenged his dismissal by presenting evidence of pervasive discriminatory practice within the desegregated school district. Although the district court recognized a prima facie case, the school district was compelled to do no more than articulate a legitimate nondiscriminatory basis for the alleged discriminatory practice. The appeals court remanded, insisting that further inquiry determine whether there was a recent history of racial segregation or evidence of intentional segregative action. If found, such evidence would place the burden on the school district to show "clear and convincing evidence" justifying the administrator's dismissal.[8]

An Alabama school board's policy expressing a preference for qualified insiders would not give rise to an inference of racially discriminatory intent upon a showing that an outside applicant was selected over a black employee of the district. The Eleventh Circuit Court of Appeals concluded that the principal concern under the circumstances would be to determine whether the district's hiring decision was based on the outside applicant's superior qualifications or the minority status of the rejected employee.[9]

The alleged actions of black parents who sought to remove the white principal of a predominantly black elementary school were viewed as sufficient to justify a cause of action for conspiracy to deny civil rights, defamation, and tortious interference with contract under federal law. Among actions that were supposedly designed to force resignation were school boycotts, office demonstrations, and other harassment.[10]

2.1b Sex

A showing that, in choosing a replacement for a position as an elementary school principal, an Alaska school board failed to use the

7. Peques v. Morehouse Parish School Bd., 706 F.2d 735 (5th Cir. 1983).
8. Knighton v. Laurens Cty. School Dist., 721 F.2d 976 (4th Cir. 1983).
9. Clark v. Huntsville City Bd. of Educ., 717 F.2d 525 (11th Cir. 1983).
10. Stevens v. Tillman, 568 F. Supp. 289 (D. Ill. 1983).

same criteria or to undertake a fair comparison of the female applicant's qualifications and abilities in relationship to the male applicant selected was sufficient to establish a prima facie case of sex discrimination.[11]

A Colorado school district was able to articulate a legitimate, nondiscriminatory reason for refusing to select the female applicant for a position as school principal and director of special education. Although the plaintiff was able to establish a prima facie case of disparate treatment under Title VII, the school district's rationale that other candidates were more qualified and that there were doubts about the female applicant's ability to get along with others was sufficient to overcome a prima facie case.[12]

The Eighth Circuit Court of Appeals overruled a district court determination and held that a school district's stated reasons for selecting a male candidate over a woman applicant for a principalship met the burden to establish a legitimate, nondiscriminatory reason for the hiring and were not a subterfuge for discrimination. The district established that it hired the male because of the female applicant's lack of administrative experience and her negative references.[13]

A South Carolina school district overcame a claim of sex discrimination under Title VII by establishing clear and convincing evidence that a female applicant for a position as an assistant principal would not have been hired for the position absent discrimination. Evidence in the lower court record established that four of five job interviewers would have selected another female applicant ahead of the plaintiff for reasons other than prohibited sex discrimination. Two female applicants, other than plaintiff, were promoted to administrative positions shortly after the interviews for assistant principal. Since plaintiff did not suffer damage as the result of the alleged discrimination, an award of promotion and back pay was reversed.[14]

A school district's determination that a male applicant should be selected as vice-principal because of superior qualifications was upheld by an Indiana federal district court upon a finding that the district's selection rationale was not a pretext for sex discrimination.[15]

---

11. Strand v. Petersburg Pub. Schools, 659 P.2d 1218 (Alas. 1983). *See* Garza v. Brownville Indep. School Dist., 700 F.2d 253 (5th Cir. 1983). A female applicant for a position as assistant principal was successful in establishing a claim of sex discrimination under Title VII and had the right to a remedy that included an offer of the next available comparable position.

12. Verniero v. Air Force Academy School Dist. No. 20, 705 F.2d 388 (10th Cir. 1983).

13. Danzl v. North St. Paul-Maplewood-Oakdale Indep. School Dist., 706 F.2d 813 (8th Cir. 1983).

14. Patterson v. Greenwood School Dist., 696 F.2d 293 (4th Cir. 1982).

15. Parker v. Board of School Comm'rs of City of Indianapolis, 558 F. Supp. 680 (S.D. Ind. 1983).

Pregnant teachers seeking sick leave benefits met with disqualifying policy standards in two state court decisions. New Jersey State Board of Education policy was held reasonable in creating a presumptive period of disability, provided a teacher applying for a longer period of sick leave could present medical certification of the specific nature of her disability.[16] The North Dakota Supreme Court upheld a board's presumptive allowance for three weeks of sick leave following delivery, even though physicians for three teachers recommended that the teachers not return to work for six weeks. In the latter case, the court regarded evidence adduced at trial as demonstrating the teachers were physically able to return to work after three weeks.[17]

A school district policy that denied disability compensation for pregnancy but allowed use of accumulated sick leave for any other certified disability has been declared unlawful sex discrimination by a Pennsylvania appeals court.[18] And, in a related case, a federal appeals court has ruled that a California school district must provide medical benefits for pregnancy-related conditions of female employees' spouses at the same coverage level as is provided to male employees' spouses.[19]

An untenured female teacher, employed as a substitute following her second pregnancy leave, overcame a statute of limitations defense by asserting that she was discriminated against because of her sex when the school district refused to employ her in a full-time position on the basis of prior involuntary pregnancy resignations. Her allegation was held sufficient to constitute a continuing wrong that overcame the defense that her claim was time barred.[20]

2.1c Age

A maximum age of sixty-five for school bus drivers was held both necessary and reasonable considering safety risks and fell within the bona fide occupational qualification exception to the Age Discrimination in Employment Act.[21]

2.1d Handicap

A blind applicant for an Arkansas school library position failed to demonstrate that she was denied employment solely by reason of her

16. Hynes v. Board of Educ. of Bloomfield, 461 A.2d 1184 (N.J. Super. Ct. 1983).
17. Crowston v. Jamestown Pub. School Dist. No. 1, 335 N.W.2d 775 (N.D. 1983).
18. Dallastown Area School Dist. v. Pennsylvania Human Rel. Comm'n, 460 A.2d 878 (Pa. Commw. Ct. 1983).
19. United Teachers, Los Angeles v. Board of Educ., City of Los Angeles, 712 F.2d 1349 (9th Cir. 1983).
20. Mamos v. School Comm. of Town of Wakefield, 553 F. Supp. 989 (D. Mass. 1983).
21. Maki v. Commissioner of Educ., 568 F. Supp. 252 (N.D.N.Y. 1983).

handicap or as the result of invidious discrimination violative of equal protection of the laws. Having initially established a prima facie case, the applicant was unable to show that the reasons given for denying her the position were pretextual and designed as a subterfuge to hide discrimination. The school board's articulated reason for not hiring the applicant focussed on the superior experience, training, and evaluation references of a competing applicant.[22]

An applicant for a school bus driver's license who required a hearing aid was an otherwise qualified handicapped applicant in the opinion of the Third Circuit Court of Appeals. The court remanded the case for further consideration of the state of Pennsylvania's claim that the hearing requirement was an essential requirement of the licensure program or that revising the hearing aid policy would impose an undue burden on the state.[23]

A former school bus driver, who was denied reemployment as a bus driver due to a new regulation prohibiting the employment of drivers with missing extremities, was successful in winning equitable relief in his suit against a Texas school district. After a finding that the plaintiff was "an otherwise qualified handicapped individual" for purposes of the Rehabilitation Act of 1973,[24] the court concluded that the school district had violated federal law prohibiting discrimination against the handicapped. While no monetary damage award was allowable under the court's interpretation, plaintiff did secure an order that he be employed upon condition that he present his valid state chauffeur's license and pass a routine physical examination.[25]

2.2 SUBSTANTIVE CONSTITUTIONAL RIGHTS

Allegation of a denial of free speech or association under the first amendment is the most frequent substantive constitutional claim pressed by a plaintiff-employee in appellate cases involving an adverse employment decision. Often these claims depend on a careful analysis of factual questions initially resolved at the trial court level and reviewable only under the appellate court's "clearly erroneous" test.

2.2a Speech and Association

A Michigan school district, which placed an undercover police woman in two high school classes for the announced purpose of

22. Norcross v. Sneed, 573 F. Supp. 533 (Ark. 1983).
23. Strathie v. Department of Transp., 716 F.2d 227 (3d Cir. 1983).
24. *See* 29 U.S.C. § 794.
25. Longoria v. Harris, 554 F. Supp. 102 (S.D. Tex. 1982).

investigating drug trafficking, was sued by parents, students, and teachers on the grounds that the action infringed first amendment rights. The plaintiffs contended that impermissible political considerations motivated the placement of the police agent and alleged that the subsequent discovery of the covert operation stifled free speech and open discussion, interfered with academic freedom, and stigmatized teachers and students. In reviewing the plaintiffs' complaint neither the federal district court nor the Sixth Circuit Court of Appeals found any allegation of a tangible consequence, such as classroom disruption or adverse employment decision that could demonstrably be linked to a chilling effect on first amendment rights to speech and association. Absent such a direct injury or immediate threat of harm, the plaintiffs' complaint was dismissed for failure to state a cause of action on which judicial relief could be granted. The circuit court was unwilling to entertain a case in which the controversy contained no allegation of any tangible or concrete inhibitory effect on classroom expression.[26]

A high school track coach was terminated for protesting the school board's decision to drop its junior high track program by writing a letter to the editor of the local paper. In a decision reflecting the rationale in *Pickering v. Board of Education*,[27] the Eighth Circuit Court of Appeals ruled the school board's action violated the coach's first amendment right to free speech and reinstated his employment.[28]

An Alabama teacher established a prima facie case that his dismissal was motivated by his instigation of an investigation into the improper use of football game receipts by a high school principal. On remand, the Alabama Supreme Court instructed the trial court to open the scope of inquiry into the reasons for the teacher's dismissal, placing the burden of proof on the school district to establish that the teacher could have been dismissed absent his constitutionally protected conduct.[29]

The Fifth Circuit Court of Appeals has remanded a case involving a nonrenewed public school cafeteria worker who claimed a violation of her first amendment rights based on her allegation that she was not renewed because she had enrolled her son in a private school. The appellate federal court instructed the district court to determine whether or not the protected conduct played a substantial part in the school board's nonrenewal decision and, if so, whether the employee could have been terminated for reasons other than those related to her decision to enroll her child in a private school.[30]

---

26. Gordon v. Warren Consol. Bd. of Educ., 706 F.2d 778 (6th Cir. 1983).
27. 391 U.S. 563 (1968).
28. McGee v. South Pemiscot School Dist., 712 F.2d 339 (8th Cir. 1983).
29. Abston v. Woodward, 437 So. 2d 1261 (Ala. 1983).
30. Brantley v. Surles, 718 F.2d 1354 (5th Cir. 1983).

A probationary librarian in Michigan was held to have been denied reemployment for engaging in conduct protected under the state's Public Employment Relations Act. The librarian was terminated following an unsatisfactory evaluation citing "attitudinal problems" that were traced to her filing of an employee grievance and outspoken criticism of the principal.[31]

A prospective teacher was unsuccessful in establishing a claim that she was not hired because of her participation in partisan political activities, particularly as they related to community and school committee affairs. There was no evidence that a school committee decision not to hire her for a vacant teaching position was motivated by a desire to punish her for her political activity; therefore, she failed to establish any denial of constitutionally protected speech or associational rights.[32]

A Texas school board carried its burden to establish that the employee would have been released absent consideration of the school principal's exercise of constitutional rights. Relying on *Mt. Healthy Board of Education v. Doyle*,[33] the Fifth Circuit Court of Appeals held that evaluations by two separate superintendents over a period of nine years established that the principal had difficulty in working with parents and coworkers. Although the principal asserted that his termination was based on his refusal to support a school bond issue and on public complaints concerning the school system, the evaluation record made clear that the board relied on appropriate grounds for termination.[34]

A school psychologist, dismissed under a New York school code provision allowing for discretionary dismissal of nontenured staff, was unable to carry the burden of proof necessary to establish that her termination was in retaliation for the exercise of free speech.[35]

While a teacher's representation of union membership at board meetings and conferences is constitutionally protected conduct, a Kentucky school teacher was unable to establish a first amendment claim where such protected conduct was held not to play a substantial part in the board's decision to change her teaching schedule. No loss of benefits, salary, or rank accompanied the change, but even if the change could be considered to have a "chilling effect on free speech," there was ample evidence the recommendation for change in schedule was the result of staff cutbacks and not the employee's exercise of free

31. Napoleon Educ. Ass'n v. Napoleon Commun. Schools, 336 N.W.2d 481 (Mich. Ct. App. 1983).
32. Smith v. Harris, 560 F. Supp. 677 (R.I. 1983).
33. 429 U.S. 274 (1977).
34. Yielding v. Crockett Indep. School Dist., 707 F.2d 196 (5th Cir. 1983).
35. Forrest v. Ambach, 463 N.Y.S.2d 84 (N.Y. App. Div. 1983).

speech.[36] Similarly, a Mississippi teacher failed to establish that her nonrenewal was based on her exercise of a constitutional right to union membership. The district had no obligation, under Mississippi state law, to provide a justification for nonrenewal to a probationary teacher, and since the teacher could produce no indication that the nonrenewal decision was primarily or substantially motivated by a desire to punish her for union membership or association, the Mississippi Supreme Court held there was no evidence of a violation of constitutional rights.[37]

A federal court of appeals has ruled that the determination of whether a school district's vocational director was denied his rights to free speech and association in a nonrenewal of contract case is a matter for jury determination on the question of whether the board would have refused to renew the director's contract absent consideration of his expression of views on a school practice and his association with a faction on the board.[38]

A California teacher who contended that his promotion was denied based on his exercise of free speech won remand of the case when the Ninth Circuit Court of Appeals concluded reversible error resulted from an instruction that left to the jury the decision of weighing the teacher's interest in free speech against the state's interest. Such a test is a question of law, not fact, and requires a determination by the court.[39]

2.2b Religion

An Iowa school district was held to have reasonably accommodated a school employee's religious beliefs by permitting unpaid leave for Jewish High Holy Days. The Iowa Supreme Court found that the district's policy on religious leaves of absence was consistent with the provisions of the master contract and uniformly applied.[40] The same

36. Reichert v. Draud, 701 F.2d 1168 (6th Cir. 1983).

37. Tanner v. Hazlehurst Mun. Sep. School Dist., 427 So. 2d 977 (Miss. 1983).

38. Burris v. Willis Indep. School Dist., 713 F.2d 1087 (5th Cir. 1983). *See* Bryant v. St. Helena Parish School Bd., 561 F. Supp. 239 (M.D. La. 1983). Despite the suspiciously contemporaneous timing of dismissal proceedings and a teacher's involvement with a citizens' group challenging a school board election, a federal district court has ruled that the dismissed Head Start teacher failed to establish that the school board's decision was motivated by a desire to punish for the exercise of free speech. *But see* Thomas v. Farmer, 573 F. Supp. 1292 (W.D. Ohio 1983). Citing a school board's alleged campaign to punish a tenured teacher for statements made as a bargaining representative at a school board meeting, a federal district court has ruled that liability for a denial of civil rights based on first amendment protection could be established.

39. Loya v. Desert Sands Unified School Dist., 721 F.2d 279 (9th Cir. 1983). *See* Connick v. Meyers, ___ U.S. ___, 103 S. Ct. 1684 (1983).

40. King v. Iowa Civil Rights Comm'n, 334 N.W.2d 598 (Iowa 1983).

issue was raised by a Colorado school district policy that provided two days of paid personal leave per year. The policy did not violate a teacher's free exercise of religion despite the teacher's claim that the teacher sought to attend temple for two days each on Yom Kippur and Rosh Hashanah.[41]

2.3 PROCEDURAL DUE PROCESS

2.3a Property Interest

The Fifth Circuit Court of Appeals has ruled that a Texas school superintendent had only a subjective and unilateral expectation of continued employment, which would not constitute a property interest worthy of constitutional protection. In seeking a contract extension, the superintendent had received an offer of employment, but no finalized written contract had been developed. The court refused to regard the school board's offer, coupled with the superintendent's willingness to accept the offer, as a binding agreement creating a legitimate expectancy of continued employment.[42]

No denial of property rights was recognized in what the Eighth Circuit Court of Appeals characterized as minor deviations from district regulatory policies that applied to a special evaluation committee's review of a probationary teacher. The committee appointed to review and make recommendations on the probationary teacher's continued employment held no formal meetings nor did they transmit formal recommendations to the school superintendent, although the committee did evaluate the teacher and provide input concerning the award of tenure.[43]

An acting superintendent who was replaced after a year's service and reassigned as a school principal sought reinstatement on the grounds that the school board failed to evaluate him under the terms of West Virginia's "employee" evaluation standards, and, as a consequence, he enjoyed a genuine entitlement to the position of superintendent on the presumption of satisfactory performance. In denying the plaintiff's claim, the state supreme court held that a superintendent is an officer elected by the local board and is *not* an "employee' in contemplation of statute law.[44]

The Seventh Circuit Court of Appeals refused to recognize a constitutionally protected property right in continued employment as a

41. Pinsker v. Joint Dist. No. 28J, 554 F. Supp. 1049 (D. Colo. 1983).
42. Cannon v. Beckville Indep. School Dist., 709 F.2d 9 (5th Cir. 1983).
43. Derrickson v. Board of Educ. of St. Louis, 703 F.2d 309 (8th Cir. 1983).
44. Lookabill v. Board of Educ., 304 S.E.2d 678 (W. Va. 1983).

principal under the Illinois School Code. Although demoted at the end of the contract year from principal to teacher, the former principal retained his salary level. No code violation was recognized and no right to due process could be claimed.[45] In another case involving demotion, a Pennsylvania Department of Education employee, whose position was abolished in a reorganization and who was reassigned to new duties and later furloughed due to lack of work, was not considered to have been demoted as long as he retained his employment classification, previous salary, and benefits.[46]

An Illinois coach and athletic director was deprived of a legitimate expectation of continued employment when the school board refused to renew his contract for a second year. When the initial contract offer was made, it was established that the board informed the coach he would be extended a second annual contract at the end of the first year. The Seventh Circuit Court of Appeals ruled that this representation by the board created an implied contract for a two-year term, which constituted a property right to due process of law before any adverse employment decision could be effectuated by the board.[47]

A Michigan school board did not constructively discharge or demote a school principal by virtue of denying him salary increases for a two-year period. An appellate court concluded that while unequal pay might support a finding of constructive discharge (that is, employer's deliberate effort to make employee's working conditions so difficult as to be intolerable, forcing involuntary resignation), a difference in pay alone would not be sufficient to support constructive discharge.[48]

2.3b Liberty Interest

A junior high school teacher who was accused of touching a student's breast with a fork and touching the student on the buttocks was suspended with pay, pending a hearing on the charges before the school board. The teacher sought to establish that this suspension with pay for a period of a little over a week violated his liberty and property interests and created a claim for nominal and compensatory damages as a denial of due process. The Eleventh Circuit Court of Appeals held

45. Lyznicki v. Board of Educ., 707 F.2d 949 (7th Cir. 1983).

46. Silverman v. Commonwealth Dep't of Educ., 454 A.2d 185 (Pa. Commw. Ct. 1982).

47. Vail v. Board of Educ. of Paris Union, 706 F.2d 1435 (7th Cir. 1983); Kanter v. Community Consol. School Dist., 558 F. Supp. 890 (Ill. 1982). In Illinois, a tenured public school teacher was held not to have a legitimate claim of entitlement to a merit salary increase, foreclosing any federal constitutional right to written standards defining merit or written reasons for denial of such an increase.

48. LeGalley v. Bronson Comm.nun. Schools, 339 N.W.2d 223 (Mich. Ct. App. 1983).

otherwise, finding that the teacher's property interest was too insubstantial to warrant due process protection inasmuch as he could allege only that he was deprived of the right to teach and coach for a week's time. As to the teacher's claim that the accusations were so stigmatizing as to deny a liberty interest, the court held that there was no allegation that school officials had been responsible for disseminating information on the charges to members of the community. Absent an allegation or proof the board published the charges against the teacher, the claim of a denial of liberty failed.[49]

A New York school administrator, whose "at-will" status prohibited any claim to a property interest in continued employment, made out a claim for deprivation of liberty without due process and slander per se, which justified further proceedings to determine whether the stigmatizing statement made by board members was disseminated publicly. The statement made by the president of the board and the local superintendent accused the administrator of dishonesty and deceiving the board into believing he was a certified school business administrator.[50]

2.3c Aspects of Notice

Termination proceedings involving a teacher-coach were nullified due to a Nebraska school board's failure to provide adequate notice of the charges against the employee. The teacher's sole notice of charges was a letter, described in the Nebraska Supreme Court opinion as "vague and conclusory," which stated grounds for termination on the basis of neglect of duty and insubordination. Two days before the hearing the employee was given what later was established to be an incomplete list of witnesses against him. The court found neither of these actions were in compliance with minimum procedural due process.[51]

Under the statute laws of most jurisdictions, the failure of a school board to give notice of nonrenewal of a short-term, probationary, or

---

49. Hardiman v. Jefferson Cty. Bd. of Educ., 709 F.2d 635 (11th Cir. 1983).

50. Supan v. Michelfeld, 468 N.Y.S.2d 384 (N.Y. App. Div. 1983). *See* Orshan v. Macciarola, 570 F. Supp. 620 (E.D.N.Y. 1983). An award of $30,000 resulting from noneconomic harm occasioned by the summary demotion of a high school principal to the rank and salary of an assistant principal has been upheld by a New York federal district court. The court sustained a jury determination that injury to career opportunities, reputation, and emotional well-being resulted from the demotion of the principal who had acquired tenure by estoppel in an earlier proceeding.

51. Irwin v. Board of Educ., 340 N.W.2d 877 (Neb. 1983). *But see* Fleming v. Vance Cty. Bd. of Educ., 298 S.E.2d 733 (N.C. Ct. App. 1983). A North Carolina appeals court narrowly interpreted state statutory provisions requiring thirty days' notice of nonrenewal in favor of a school board that had given notice of nonrenewal to a probationary employee.

supplemental contract will result in automatic renewal of the contract for an additional term. Two teachers who had been issued supplemental contracts to work as coaches did not receive notice of nonrenewal. The Ohio Supreme Court concluded that any teacher employed by the board of education to perform additional duties pursuant to a supplemental written contract is deemed reemployed unless the employing board of education gives such teacher written notice of its intention not to reemploy him to perform additional duties within the statutory deadline.[52]

Failure to provide a director of pupil personnel proper statutory notification that he had been demoted to a position of classroom teacher created a cognizable claim against a school district for denial of due process. The school board did not properly act to provide timely notice of demotion prior to the statutorily mandated date of May 15.[53] Similarly, the failure to give an Oregon superintendent notice of nonrenewal on or before April 1 resulted in an award of a year's additional employment when an Oregon appellate court ruled the superintendent was an "administrator" within the meaning of the statute requiring notice.[54]

Connecticut statute law requires that before a board can terminate a teacher's contract it must provide written notification that such a termination is "under consideration." A nontenured part-time teacher was notified at the beginning of the school year that the defeat of a local school funding referendum would compel the elimination of her job. Since this notice was after the fact, the Connecticut Supreme Court sustained a lower court ruling that the notice was insufficient and untimely and granted a year's back pay for the school year.[55]

Failure to provide statutorily required written notice of findings and determination within ten days of a hearing at which the suspended Tennessee teacher was present did not deny due process or unfairly prejudice the teacher, nor would that failure justify nullification of the board's action. The Supreme Court of Tennessee ruled that actual notice, based on the teacher's presence at the hearing, was sufficient for due process protection.[56]

Substantial compliance with statutory notice of nonrenewal was recognized by the Supreme Court of Arkansas when the teacher was informed that the remedial reading program in which she instructed would not be continued in the next school year and no other position

52. Tate v. Westerville City Bd. of Educ., 448 N.E.2d 144 (Ohio 1983).
53. Banks v. Board of Educ. of Letcher Cty., 648 S.W.2d 542 (Ky. Ct. App. 1983).
54. Mitchell v. Board of Educ., 669 P.2d 356 (Or. Ct. App. 1983).
55. Petrovich v. New Canaan Bd. of Educ., 457 A.2d 315 (Conn. 1983).
56. Davis v. Barr, 646 S.W.2d 914 (Tenn. 1983).

was available for her to fill. The teacher recognized that she would not be reemployed when she began applying to other districts for teaching positions.[57]

A Delaware teacher's federal constitutional rights were not violated even though state statutory procedures for the conduct of terminations were not followed. The federal district court ruled that procedural protections offered the teacher did comply with federal due process standards despite deviation from state procedural guidelines.[58] And, in a case from New York, a teacher was estopped from contesting the timeliness of a notice of receipt of disciplinary charges against him when he acknowledged receipt of the charges and only later, after the time for service of notice had run out, contended that he had not received the charges.[59]

An Oregon teacher, who was dismissed for "gross unfitness" and "immorality" involving allegations he assaulted and battered a student, sought to establish that a notice of dismissal was inadequate because the notice recited only those facts that were contained in a civil action filed against the teacher. The Oregon appellate court held the notice informed the teacher of the charges against him with sufficient particularity to prepare his defense, since the connection between the alleged acts and teaching responsibilities could reasonably be inferred.[60]

2.3d Aspects of Hearing

An Oklahoma school superintendent was properly denied a hearing to contest the local board's decision not to renew his contract and was held to have no right to acquire tenure under Oklahoma statutes. The Oklahoma Supreme Court found no merit in an alternative contention that the local board's adopted evaluation policy created an implied contract provision that secured a reasonable expectancy of continued employment upon satisfactory performance evaluations. The court found no evidence in this instance that the board had contractually obligated itself to base a nonrenewal decision on employee evaluations.[61]

The Supreme Court of South Dakota has ruled that under state statute law, a nontenured probationary employee is not entitled to receive a list of reasons for nonrenewal, nor can the employee present

---

57. Lee v. Big Flat Pub. Schools, 658 S.W.2d 389 (Ark. 1983).
58. Brandywine Affiliate v. Board of Educ. of Brandywine School Dist., 555 F. Supp. 852 (D. Del. 1983).
59. Maida v. Ambach, 467 N.Y.S.2d 931 (N.Y. App. Div. 1983).
60. Shipley v. Salem School Dist., 669 P.2d 1172 (Or. Ct. App. 1983).
61. Board of Educ. v. Morris, 656 P.2d 258 (Okla. 1983).

witnesses at an informal conference provided by the local board on request of the employee.[62]

A Florida appeals court has ruled that no substantial interest compelling a due process hearing was involved in a teacher's transfer to another facility within the school district. Neither a property right to employment at a particular school nor any harm to reputation or pecuniary interests was established by the transferred teacher.[63]

Pennsylvania statutes do not entitle a temporary professional employee of a school district to a full evidentiary hearing prior to dismissal for unsatisfactory performance ratings.[64] Likewise, an Idaho probationary teacher's statutory right to notice and hearing on nonrenewal is satisfied when the school district board provides a statement of the reasons for nonrenewal and an opportunity for informal review by the board.[65]

2.4 DISMISSAL AND DISCIPLINE

The range of possible adverse employment decisions extends to many board actions in addition to dismissal. Demotion, denial of promotion or salary increment, reassignment, reprimand, or transfer can be alternatives to discipline the public school employee where authorized by state law. In general, however, the board's authority is most often challenged where dismissal of the employee is ordered.

2.4a Insubordination

A science teacher with nineteen years of experience was dismissed for insubordination under Mississippi statute law following several incidents in which he refused assignments involving supervision of students at a football game and during examinations on school grounds. The teacher contended it was error for the board to consider testimony as to the first instance of insubordination since it had never become a record in his personnel file and had taken place a year previous to the second instance. The Supreme Court of Mississippi held otherwise, noting that the admission of both instances were justified to

62. Coull v. Spearfish Bd. of Educ., 340 N.W.2d 695 (S.D. 1983).

63. Martin v. School Bd. of Gadsden Cty., 432 So. 2d 588 (Fla. Dist. Ct. App. 1983). *But see* Wood v. Independent School Dist. No. 141, 661 P.2d 892 (Okla. 1983). The Supreme Court of Oklahoma has held that a probationary teacher's interest in reemployment was sufficient to warrant an informal hearing before a school board, although with minimal procedural protection.

64. Husted v. Canton Area School Dist., 458 A.2d 1037 (Pa. Commw. Ct. 1983).

65. Webster v. Board of Trustees, 659 P.2d 96 (Idaho 1983).

establish a "constant or continuing intentional refusal to obey a direct or implied order."[66]

The Arkansas Supreme Court upheld a nonprobationary teacher's dismissal for destroying examination papers and failing to timely report lost or damaged books. School directives requiring teachers to retain final exams and report lost or damaged books were upheld as reasonable, particularly because the absence of final examinations made it more difficult to reconstruct several students' grades challenged by parents and failure to report the lost or damaged books resulted in additional mailing expenses of up to $300, which the school had to absorb.[67]

The actions of a high school principal were described as "errors of judgment" not warranting suspension in the view of the Supreme Court of Appeals of West Virginia. In the case, the principal had arranged for final term grades to be submitted prior to the final two class days of the school year, which resulted in a substantial decline in attendance for the final two days.[68]

A Louisiana appellate court has ruled that a teacher's failure to report for duty following a transfer directive of the school board was willful neglect of duty justifying dismissal. The teacher had sought to establish that the transfer was a "removal" that required formal due process protections under the state tenure law. The court held that a transfer did not constitute a removal when the teacher would have received a rank, salary, and status equivalent to that received in her previous position.[69]

Under Florida law, "gross insubordination or willful neglect of duty" would not be a proper basis for dismissal unless the school district could establish that the employee had received a direct order and failed to obey. In the specific case, a teacher demoted to annual contract status discussed his demotion with students, who then undertook petitions on behalf of the teacher.[70]

In the view of a Colorado appellate court, a tenured teacher's failure to follow his principal's postevaluation suggestions to improve teaching performance was appropriately a basis for dismissal on grounds of insubordination.[71] In a similar case from Missouri, a school board was justified in dismissing a tenured teacher who refused to teach a subject

66. Jackson v. Hazlehurst Mun. Sep. School Dist., 427 So. 2d 134 (Miss. 1983).
67. Moffitt v. Batesville School Dist., 643 S.W.2d 557 (Ark. 1983).
68. Totten v. Board of Educ. of Mingo Cty., 301 S.E.2d 846 (W. Va. 1983).
69. Slaughter v. East Baton Rouge Parish School Bd., 432 So. 2d 905 (La. Ct. App. 1983).
70. Rutan v. Pasco Cty. School Bd., 435 So. 2d 399 (Fla. Dist. Ct. App. 1983).
71. Thompson v. Board of Educ., 668 P.2d 954 (Colo. Ct. App. 1983).

in which she had unilaterally withdrawn her certification. Budget cutbacks necessitated the teacher's reassignment from courses she was certified to teach.[72]

2.4b Unprofessional Conduct, Immorality, or Unfitness

Written complaints of sexual harassment submitted by at least ten children were sufficient to justify a school board's dismissal of an Indiana school bus driver. The hearing afforded the driver was sufficient to ensure procedural due process, even though the identity of the complainants was kept secret, where the board's investigation included steps to avoid collusion and the driver had the opportunity to refute the charges by other means. The court noted that the children were frightened of the bus driver and by the thought of having to recount that the driver had improperly touched them and attempted to lie on top of the children in the back of the school bus.[73]

A Pennsylvania tenured teacher was suspended for a year on charges that his conduct constituted sexual harassment. On appeal, a state court reversed the suspension on the ground that Pennsylvania statute did not authorize suspension after a dismissal proceeding in which two-thirds of the board members failed to vote for discharge.[74] However, a school custodian's dismissal for continually harassing a female teacher was justified as repeated acts of misconduct under New York law.[75]

Termination of a tenured Montana teacher was justified in consideration of poor performance. Evidence in the case, particularly classroom evaluations and testimony of parents and colleagues, tended to show the teacher was abusive and arbitrary with students and had frequent confrontations with parents and the school principal. Despite warnings and notices of deficiencies in evaluation reports, the teacher's behavior was considered unchanged.[76]

A Nebraska teacher who used the racial epithet "Dumb Niggers" to describe several black students in an integrated class was properly dismissed under a Nebraska statute that authorized cancellation of contract on grounds of immorality or insubordination.[77] In an analogous case, the use of loud, insolent, and abusive language toward faculty colleagues and other school personnel was a proper basis for the dismissal of an elementary art teacher in Massachusetts.[78]

---

72. McLaughlin v. Board of Educ., 659 S.W.2d 249 (Mo. Ct. App. 1983).
73. Green v. Board of School Comm'rs of Indianapolis, 716 F.2d 1191 (7th Cir. 1983).
74. Rike v. Commonwealth Secretary of Educ., 465 A.2d 720 (Pa. Commw. Ct. 1983).
75. Brais v. Board of Educ. of Massena, 460 N.Y.S.2d 387 (N.Y. App. Div. 1983).
76. Donnes v. Montana, 672 P.2d 617 (Mont. 1983).
77. Clarke v. Board of Educ. of Omaha, 338 N.W.2d 272 (Neb. 1983).
78. Kurlander v. School Comm. of Williamstown, 451 N.E.2d 138 (Mass. App. Ct. 1983).

The dismissal of a noninstructional employee of a Florida school board was upheld on evidence establishing that the employee had made disparaging racial remarks about his supervisor to other employees. A Florida appellate court concluded that the school board's interest in promoting efficiency of service justified dismissal for failure to show proper respect for the authority of supervising personnel and outweighed any claim of an employee's right to speak on a matter of no public concern.[79]

It was neither arbitrary nor capricious for an Arizona school board to dismiss a teacher for failure to cooperate in an investigation into his relationship with a seventeen-year-old high school student that eventually led to marriage between teacher and student.[80]

An Ohio school board was held to have acted properly in authorizing a written reprimand to a teacher who utilized class time to discuss personal views and experiences unrelated to subject matter and in granting the teacher the right to participate in a review of her personnel file and include a rebuttal of information she disputed in the file.[81]

Under Oklahoma standards, a nontenured teacher was not entitled to reinstatement where dismissal was predicated on instances of repeated tardiness and the procedural due process right to notice and hearing before termination was granted by the local board.[82] A hearing panel's decision to dismiss a tenured teacher who was absent from teaching duties without authorization over a three-month period was upheld as reasonable by a New York appellate court.[83]

A Florida principal's dismissal was overturned when the appellate court concluded that school board findings were insufficient to comply with the provisions of the Florida Administrative Procedures Act. Under the provisions of the law, a state hearing officer was required to make specific findings of fact on issues as to whether the improper use of school funds was mitigated by the principal's alleged intention to reimburse. It was considered harmful error for the officer to fail to rule on the proposed findings.[84]

Dismissal was held an excessive penalty for misconduct involving a New York school district's superintendent of buildings and grounds. The New York appeals court ruled that in view of the administrator's excellent record and absence of moral turpitude, it was unreasonable to dismiss for misconduct connected with exceeding a budget

79. Jacker v. School Bd. of Dade Cty., 426 So. 2d 1149 (Fla. Dist. Ct. App. 1983).
80. Welch v. Board of Educ. of Chandler, 667 P.2d 746 (Ariz. Ct. App. 1983).
81. Petrie v. Forest Hills School Dist., 449 N.E.2d 786 (Ohio Ct. App. 1982).
82. Winslett v. Independent School Dist. No. 16, 657 P.2d 1208 (Okla. Ct. App. 1982).
83. Kuhle v. Ambach, 457 N.Y.S.2d 1013 (N.Y. App. Div. 1982).
84. Pelham v. Whaley, 436 So. 2d 951 (Fla. Dist. Ct. App. 1983).

appropriation in the absence of authorization and paying one individual for painting work done by another.[85]

Evidence of habitual or excessive use of alcohol was not sufficient to justify dismissal of a "career teacher" in a case from North Carolina. Examination of the record indicated that the only evidence of alcohol use over a two-year period was testimony from four different people who had smelled what they believed to be alcohol on plaintiff's person.[86]

An Oregon appellate court upheld a finding of the state's Fair Dismissal Appeals Board that incidents of alleged corporal punishment imposed by a teacher on students did not justify dismissal. The court found no pattern of improper use of corporal punishment in four isolated instances of interactions between teacher and students, nor was there evidence that the students sustained injury or the teacher's actions were intended to harm.[87]

A tenured elementary teacher was dismissed by an Illinois school board for excessive use of force in administering punishment and for permitting students to leave the classroom without supervisory or parental prior approval. On appeal, an Illinois appellate court reinstated the teacher, agreeing with a hearing officer's determination that the teacher's conduct was remediable and that a warning to the teacher should have been provided by school superiors.[88]

A tenured physical education teacher in Illinois won reinstatement when he successfully argued that improper use of paid and sick leave for the purpose of engaging in a part-time coaching job was a remediable deficiency that required notice and an opportunity to correct the behavior before dismissal would be warranted.[89]

An Ohio wrestling coach and guidance counselor was found to have encouraged a student wrestler to lie, in order that another team member might wrestle in the student's class. After he admitted this indiscretion and resigned his coaching position, the school board properly terminated the employee's contract as counselor.[90]

A security officer at a state school for the deaf was properly discharged for abusing an eighteen-year-old student, based on evidence that the officer angrily and physically coerced the student into cleaning spittle off the officer's vehicle. The officer's use of force resulted in the

---

85. Stevenson v. Spencerport Cent. School Dist., 468 N.Y.S.2d 763 (N.Y. App. Div. 1983).
86. Faulkner v. New Bern-Craven Cty. Bd. of Educ., 309 S.E.2d 548 (N.C. Ct. App. 1983).
87. Bethel School Dist. v. Skeen, 663 P.2d 781 (Or. Ct. App. 1983).
88. Board of Educ. of School Dist. No. 131 v. Illinois State Bd. of Educ., 445 N.E.2d 832 (Ill. App. Ct. 1983).
89. Szabo v. Board of Educ., 454 N.E.2d 39 (Ill. App. Ct. 1983).
90. Florian v. Highland Local School Dist., 570 F. Supp. 1358 (E.D. Ohio 1983).

student's suffering contusions, bleeding, and loss of a patch of hair, justifying the view that the officer had exceeded an arguable right to use reasonable force.[91]

A California school district's involvement in placing an undercover investigator in a classroom as part of a police investigation into allegations that a teacher was engaged in purchasing and receiving stolen goods would not bar the district, under principles of equitable estoppel, from seeking the teacher's dismissal based on conduct revealed by the investigation.[92]

Suspension of a teacher following indictment for possession with intent to distribute cocaine was justified within the meaning of misconduct "in office or employment" under Massachusetts statute law. The Massachusetts appellate court held that suspension was proper even though the indictment was based on the teacher's off-duty conduct.[93]

2.4c Incompetency and Persistent Negligence

A school guidance counselor was justifiably dismissed from his position for failing to register seniors in his classes required for graduation and failing to inform parents of students who were having academic difficulties. The counselor had been specifically instructed to undertake these assignments and lied to the school principal when asked if he was meeting the directives. In a ruling by the Nebraska Supreme Court, the school board's decision to dismiss the counselor for neglect of duty and unprofessional conduct was affirmed.[94]

A dismissal for "persistent negligence" was upheld by a Pennsylvania appellate court upon a showing that the school principal repeatedly failed to submit instructional requisitions for educational materials and complete textbook reviews within reasonable time frames.[95] A New York appellate court has upheld an administrative determination that suspension without pay for one year was justified for insubordination and failure to maintain class discipline and keep proper records.[96]

Evidence of incompetence and willful neglect of duty were sufficient to justify a Georgia principal's termination. Despite some conflict in the evidentiary record, the Georgia Supreme Court sustained dismissal as justified under either ground and refused to consider a claim by the

---

91. Swingle v. State Employees' Appeal Comm'n, 452 N.E.2d 178 (Ind. Ct. App. 1983).
92. Pittsburg Unified School Dist. v. Commission on Professional Competence, 194 Cal. Rptr. 672 (Cal. Ct. App. 1983).
93. Dupree v. School Comm. of Boston, 446 N.E.2d 1099 (Mass. App. Ct. 1983).
94. Bickford v. Board of Educ., 336 N.W.2d 73 (Neb. 1983).
95. Crossland v. Bensalem Twp. School Dist., 494 A.2d 632 (Pa. Commw. Ct. 1983).
96. Piazza v. Ambach, 460 N.Y.S.2d 198 (N.Y. App. Div. 1983).

principal that statutes governing dismissal were unnecessarily vague and untimely raised.[97]

California statutory provisions on evaluation and notice of incompetency were complied with when a school district provided timely notice of specific deficiencies and included recommendations as to areas of improvement along with a written notice that the teacher's performance was unsatisfactory.[98]

Testimony by a psychiatrist and a clinical psychologist supported a school board's determination that the teacher suffered from a serious personality disorder justifying dismissal because of the potentially negative impact on children in his fourth-grade classroom.[99]

A high school Spanish teacher was properly dismissed for incompetency after being warned of performance deficiencies and given an opportunity to remediate when it was established that he failed to achieve performance objectives in teaching Spanish and failed to maintain proper control of assigned students.[100]

Nonrenewal of a South Dakota principal-teacher was supported by substantial evidence concerning lack of discipline in the school. The record indicated that numerous student and parent complaints, specifying instances in which the principal had failed to maintain proper control of students, were corroborated by onsite visits to the school by board members.[101]

Although a South Dakota school board failed to meet its own policy standards for evaluation of a probationary teacher, the Supreme Court of South Dakota sustained a nonrenewal decision based on the school board's substantial compliance with notice of deficiencies that provided the teacher with sufficient time to improve her teaching performance. Though the board had not conducted all statutorily mandated evaluations, those evaluations that had been conducted established deficiencies requiring remediation, and the court concluded the failure to complete all evaluations did not impair the teacher's ability to make improvements.[102]

Substantial evidence supported a school board's finding of neglect of duty and incompetence justifying a teacher's dismissal, and a trial court's reevaluation of evidence and subsequent order for teacher

97. Sharpley v. Hall Cty. Bd. of Educ., 303 S.E.2d 9 (Ga. 1983).
98. California Teachers Ass'n v. Governing Bd. of Livingston Union School Dist., 192 Cal. Rptr. 358 (Cal. Ct. App. 1983).
99. Fitzpatrick v. Board of Educ., 465 N.Y.S.2d 240 (N.Y. Sup. Ct. 1983).
100. Perez v. Commission on Professional Competence, 197 Cal. Rptr. 370 (Cal. Ct. App. 1983).
101. Jones v. Sully Buttes Schools, 340 N.W.2d 697 (S.D. 1983).
102. Schaub v. Chamberlain Bd. of Educ., 339 N.W.2d 307 (S.D. 1983).

reinstatement was reversed by an Indiana appeals court. The principal's evaluations of teaching performance confirmed allegations of lack of ability to maintain discipline, to follow administrative direction, and to properly teach students to prepare them for higher grade education.[103]

In applying the standard of preponderance of the evidence, an Iowa appeals court ruled that a school board failed to show that the record justified a teacher's dismissal for insubordination or incompetence related to allegations of failure to maintain classroom discipline, utilize adequate teaching methods, or relate to students.[104] In contrast, evidence of a teacher's use of sarcasm and ridicule with students and lack of rapport with parents justified a finding of cause for contract termination in another Iowa appellate decision.[105]

A North Carolina appeals court found substantial evidence of unsatisfactory teaching performance to justify placing a teacher on conditional status and to sustain the decision of the school board to dismiss the teacher. In addition to parental complaints of poor teaching, two principals' evaluations of the teacher's performance in two separate years indicated unsatisfactory ratings.[106]

A Pennsylvania appellate court remanded a dismissal case to the Pennsylvania Secretary of Education for a determination as to which of several teacher evaluation ratings should be used to determine whether a tenured second-grade teacher could be terminated. Pennsylvania requires that dismissal for incompetency be based on a minimum of two consecutive unsatisfactory ratings but the court was unable to discern which ratings were relied on by the district or the secretary in reaching the employment decision.[107]

Dismissal of a Colorado teacher for incompetency and neglect of duty was upheld by the Colorado Supreme Court after a hearing officer completed an opinion involving twenty-four findings of fact, supported by hearsay as well as direct evidence, of the teacher's incompetence.[108]

A Pennsylvania school board's decision to dismiss a temporary professional employee was justified when based on classroom ratings of the

---

103. Harrison-Washington Commun. School Corp. v. Bales, 450 N.E.2d 559 (Ind. Ct. App. 1983).
104. Board of Dirs. of South Winneshiek v. Sexton, 334 N.W.2d 341 (Iowa Ct. App. 1983).
105. Everett v. Board of Educ. of Hampton, 334 N.W.2d 320 (Iowa Ct. App. 1983).
106. Davidson v. Winston-Salem/Forsyth Cty. Bd. of Educ., 303 S.E.2d 202 (N.C. Ct. App. 1983).
107. Hamburg v. Commissioner, Dep't of Educ., 458 A.2d 288 (Pa. Commw. Ct. 1983).
108. Benke v. Neenan, 658 P.2d 860 (Colo. 1983).

teacher's performance and the testimony of the school principal and district superintendent confirming the observation ratings. No evidence was presented indicating that the unsatisfactory rating was arbitrary or procedurally defective, and the consequent discharge was upheld by a Pennsylvania appellate court.[109]

2.5 REDUCTION IN FORCE AND ABOLITION OF POSITION

2.5a Necessity for Reduction in Force

An Iowa Supreme Court decision sustained the propriety of a school superintendent's actions in effectuating a reduction in force (RIF). The superintendent established that severe budgetary imbalances were first addressed through natural attrition of staff, followed by efforts to renegotiate terms of the master contract. Once these efforts proved inadequate, the selection of the teacher to be laid off was influenced by certification and seniority, with the teacher selected having less mobility in terms of reassignment within the district.[110]

Under Illinois law, hearings are required when economic necessity compels dismissal of more than five tenured teachers within a district. In an Illinois appellate court decision a school board that had issued honorable dismissals to fifty-nine teachers could not moot a class action challenge to the reduction in force by stipulating that all but five of the tenured teachers who received dismissal notices were rehired or declined offers of reemployment. The court found that the right to hearings on the necessity for a RIF crystallized at the time of notice of dismissal, though hearings would extend only to those tenured teachers who were not offered reemployment.[111]

A federal district court has held that a former school dietitian received appropriate due process when she was given notice of termination due to a reduction in force and was permitted an opportunity for appeal. Although the employee's contract specified termination only for cause, the court found that the bona fide condition of financial exigency did exist in the school district and such a condition constituted "cause."[112]

---

109. Kudasik v. Board of Dirs., 455 A.2d 261 (Pa. Commw. Ct. 1983).

110. Smith v. Board of Educ. of Mediapolis, 334 N.W.2d 150 (Iowa 1983). *See also* Olds v. Board of Educ., Nashua Comnun. School Dist., 334 N.W.2d 765 (Iowa Ct. App. 1983) (seniority as stipulated in the master contract would be a determining factor in layoffs).

111. Wheatley v. Board of Educ., 446 N.E.2d 1257 (Ill. App. Ct. 1983).

112. Barry v. Blue Springs R-IX School Dist., 557 F. Supp. 249 (W.D. Mo. 1983). *See* San Jose Teachers Ass'n v. Allen, 192 Cal. Rptr. 710 (Cal. Ct. App. 1983). A school district's financial circumstances would be a legitimate consideration in any decision to reduce or discontinue school services, including the reduction of classroom teaching.

2.5b Elimination of Position

A school board, having determined that, due to declining enrollment, the number of social studies positions should be reduced and one teaching position eliminated, was challenged in its decision by the social studies teacher whose position was eliminated. The New York appellate court found for the school board, concluding that the administrative hearing panel had exceeded its authority by insisting that the board justify its decision to eliminate a position in social studies rather than in the English program. The board made its determination of the position to be eliminated on the basis of state-required curriculum mandates and courses desired by parents and students and demonstrated that reshuffling of schedules so as to retain a particular teacher was impossible. Thus, no further justification was required, provided, as in this instance, the board exercised its discretion reasonably without evidence of arbitrary or capricious conduct.[113]

Under provisions of most reduction in force policies, whether collectively negotiated or mandated by state law, it is generally held to be impermissible to nonrenew a tenured teacher while retaining a nontenured teacher in a position for which the tenured teacher is equally qualified. A Kansas school board, responding to past and projected enrollment declines, undertook a reduction in force in which a tenured high school English teacher in the language arts program was excessed. All junior high school positions in English were removed from consideration by the board, although the excessed teacher alleged the board had acted arbitrarily and capriciously in identifying the position to be eliminated and selecting the employee to be excessed. The reviewing courts agreed that the school board's decision distinguishing categories of "language arts" specializations in high school and junior high was arbitrary. The court found the categories of specialization unrecognized under school board policy, certification, or state law requirements and went further to hold that the excessed teacher was well qualified to assume a position as a junior high school English teacher. Having found the board's action arbitrary and capricious, the court concluded the reduction in force was violative of the Kansas tenure statute insofar as several probationary teachers at the junior high school level had been rehired while the senior high English teacher had not been renewed.[114]

Although Iowa courts recognize that a reduction in force is not an occasion for determination of good cause for dismissal, the Iowa

113. Rappold v. Board of Educ., Cleveland Hills, 464 N.Y.S.2d 240 (N.Y. App. Div. 1983).
114. Coats v. Board of Educ., 662 P.2d 1279 (Kan. 1983).

Supreme Court has compelled a local district to provide a hearing on how it chose specific positions for elimination, in order to avoid the possibility that a principal's layoff was related to an attempt by the board to punish for the exercise of constitutional rights or was otherwise arbitrary and capricious.[115]

2.5c Selection of Employee

A California school board, faced with the necessity of a reduction in force, sought to selectively retain teachers having Spanish-speaking skills. As a result, teachers who claimed greater district seniority challenged the board's layoff decision as violative of statute specifying that less senior teachers can be retained only where certified and competent to render special services. The board's rationale for retaining Spanish-speaking teachers, even though these teachers did not teach bilingual education classes, was related to the large proportion of Spanish-speaking students in the district. The appellate state court found that retention of less senior employees must be predicated on program requirements and not on a loosely constructed notion of "needs" identified by the district.[116]

No constitutionally protected property interest could be established by an Arkansas certified teacher whose contract was not renewed due to a reduction in force. The federal district court concluded that a full remedy was available under Arkansas statutes for any allegation of arbitrary and capricious action in the school board's determination of the proper employee to be laid off.[117]

Good cause dismissal provisions of Ohio law, which would grant substantial due process protection in dismissals relating to teacher conduct, do not apply when the course in which a teacher is certified is eliminated from the curriculum and another course in which the teacher is not certified is adopted.[118]

Notice of nonrenewal based on program discontinuance was upheld when it was established that an Oklahoma occupation services teacher was advised by certified letter of his nonrenewal and his right to a hearing. The local board's discretion in determining the program to be eliminated and the employee to be laid off was affirmed by the state appellate court.[119]

---

115. *In re* Waterloo Commun. School Dist., 338 N.W.2d 153 (Iowa 1983).
116. Alexander v. Delano Joint Union High School Dist., 188 Cal. Rptr. 705 (Cal. Ct. App. 1983).
117. Sutton v. Mariana School Dist., 573 F. Supp. 159 (D. Ark. 1983).
118. State *ex rel.* Cutler v. Pike Cty. Joint Area Voc. School, 451 N.E.2d 800 (Ohio 1983).
119. Weeks v. Northeast Oklahoma Area Voc.-Tech. School, 657 P.2d 1205 (Okla. Ct. App. 1982).

2.5d Seniority and Reassignment

Under New Jersey law a reduction in hours of employment, from full- to part-time, is a reduction in force if done for reasons of economy. However, a school board's discretion in reducing a tenured teacher's employment, along with an equal reduction for a nontenured teacher, did not violate tenure and seniority rights because the board's action was predicated on reasons of economy and the tenured teacher was not treated as the inferior of the nontenured teacher.[120]

New Jersey regulations governing seniority in appointment practices have been interpreted to permit a tenured part-time teaching staff member with proper certification to claim seniority in seeking a full-time appointment that is within the certification area and involves responsibilities identical to those of the part-time position actually held. In applying the regulations, the New Jersey Supreme Court ruled that a tenured teacher who was employed as a part-time librarian could claim seniority preference over a nontenured teacher for appointment as full-time librarian.[121]

New York subject area coordinators were subject to independent determinations as to whether or not they possessed tenure, and sufficient seniority, to protect their employment status in an economically compelled reduction in force.[122] A New York appeals court reinstated a laid-off teacher where it was established that the teacher's seniority and tenure in the area of trade electricity were superior to those of a teacher who was hired to teach appliance repair.[123] However, under New York law, library positions are not "similar" for purposes of preferences in hiring where the abolished position involved teaching responsibilities and required a teaching certificate and the newly created position had no such certification requirement.[124]

Under New York law, a position as a regular substitute is a "vacancy," which should be filled by the most senior teacher on a preferred eligibility list, particularly when it is clear that the one year substitute position would become a full-time regular position within a year due to the poor health of the incumbent teacher.[125]

---

120. Klinger v. Board of Educ. of Cranbury, 463 A.2d 948 (N.J. Super. Ct. App. Div. 1983).

121. Lichtman v. Board of Educ., 461 A.2d 158 (N.J. 1983).

122. Maine-Endwell Teachers Ass'n v. Maine-Endwell Cent. School Dist., 461 N.Y.S.2d 537 (N.Y. Sup. Ct. 1983). *See also* Forgarty v. School Comm. of Palmer, 448 N.E.2d 783 (Mass. App. Ct. 1983). Department head is a "supervisor" for purposes of statute applicable to demotion of tenured supervisors.

123. Nusz v. Board of Coop. Educ. Servs., 459 N.Y.S.2d 889 (N.Y. App. Div. 1983).

124. Smith v. Board of Educ. of East Ramapo, 468 N.Y.S.2d 539 (N.Y. App. Div. 1983).

125. Dionisio v. Mahopac Cent. School Dist., 466 N.Y.S.2d 450 (N.Y. App. Div. 1983). *But see* Taylor v. Board of Trustees, Del Norte Unified School Dist., 196 Cal. Rptr. 444 (Cal. Ct. App. 1983). No reemployment preference would apply to California substitute teachers hired to replace a regular teacher on leave of absence.

New York law restricts the award of cumulative seniority where an appointment as a substitute teacher was improper. Thus, a school board could not include any seniority credit to a substitute teacher for services performed under an improper appointment.[126] However, a New York school board was held to have unreasonably and arbitrarily applied its procedure for determining seniority among tenured faculty when it refused to recognize a teacher's years of service because the teacher had never received a formal notice of appointment.[127]

An honorably dismissed Illinois teacher could not compel a realignment of teaching positions that would combine classes from two positions, creating a single position for which the teacher could qualify. In a decision by the Supreme Court of Illinois, the school district was held not to have acted arbitrarily or capriciously by refusing to combine classes and rehire the teacher. Central to the court's determination was a finding that the teacher could not legally qualify for either of the newly created positions.[128]

The Supreme Court of Ohio has recently construed statutory provisions stipulating that seniority of service should guide the preference of the school board in reductions in force based on declining enrollment. The court has held that the statutory reduction in force does not apply when a decline in enrollment within a particular course of study necessitates the transfer of a more senior teacher from that field. No decline in the actual number of teachers resulted when a senior teacher in an occupational education program was transferred to a position as a study hall teacher due to declines in the occupational program's student enrollment. Consequently, the teacher's reliance on the statute to compel reassignment of a less senior teacher was misplaced.[129]

While a Florida school district could properly abolish a position for economic reasons, it had a duty to determine whether another position was available for which the employee was qualified. The employee, hired as a cafeteria worker, was certified to teach, but no board inquiry was made with respect to employing the worker in a teaching position.[130]

Reassignment to a teaching position from an administrative role, absent any reduction in salary, was justified on the basis of legitimate financial constraints and did not circumvent Montana tenure laws despite the dissimilar functions inherent in moving from an

126. Daul v. Board of Educ. of Mahopac, 466 N.Y.S.2d 449 (N.Y. App. Div. 1983).
127. Schoenfeld v. Board of Coop. Educ. Servs., 469 N.Y.S.2d 133 (N.Y. App. Div. 1983).
128. Peters v. Board of Educ. of Rantoul Twp., 454 N.E.2d 310 (Ill. 1983).
129. Bohmann v. Board of Educ. of West Clermont, 443 N.E.2d 176 (Ohio 1983).
130. Bass v. Gilchrist Cty. School Bd., 438 So. 2d 100 (Fla. Dist. Ct. App. 1983).

administrative to a teaching position. The Montana Supreme Court, while noting that the positions were functionally dissimilar, concluded that positions as a coordinator of intermediate education and classroom teacher were comparable for acquisition of tenure and were not contrary to the intent of the tenure statute.[131]

Reassignment as principal of a kindergarten through sixth grade from that of a principal in kindergarten through eighth grade complied with a New York statute requirement specifying placement in a "similar" position provided the employee received no reduction in salary or increment.[132]

Under a California appellate court ruling, school districts are not required to obtain a certified employee's consent to an assignment in a continuation high school even though the teacher's certification was a general secondary credential.[133]

2.6 CONTRACTUAL DISPUTES

2.6a Contractual Provisions and Board Policies

An Idaho teacher who taught six rather than the normal five class periods was entitled to a salary increment equal to 10 percent of his base salary based on a minimum standards policy adopted by the school district in 1973. The school district contended the minimum standard did not apply to the contract negotiated with the teacher in 1978, but the board introduced no substantial evidence that would reflect a different minimum standard.[134]

An Ohio teacher was granted the differential between her existing salary and the salary set forth on a newly adopted local salary schedule based on an Ohio Supreme Court's ruling that the teacher was entitled to full credit for up to five years of previous teaching service.[135] However, an Ohio board of education may establish its own service requirements for full credit on a locally adopted salary schedule as long as the teacher is given full credit for the statutory minimum of five years prior actual teaching experience.[136]

---

131. Sorlie v. School Dist. No. 2, 667 P.2d 400 (Mont. 1983).
132. Rossi v. Board of Educ. of City School Dist., 465 N.Y.S.2d 630 (N.Y. Sup. Ct. 1983).
133. California Teachers' Ass'n v. Governing Bd. of Cent. Union High School Dist., 190 Cal. Rptr. 453 (Cal. Ct. App. 1983).
134. Robinson v. Joint School Dist., 670 P.2d 894 (Idaho 1983).
135. Rauhaus v. Buckeye Local School Dist. No. 331, 453 N.E.2d 624 (Ohio 1983).
136. Maple Heights Teachers' Ass'n v. Maple Heights Bd. of Educ., 453 N.E.2d 619 (Ohio 1983). *See also* Crawford v. Board of Educ., 453 N.E.2d 627 (Ohio 1983). A substitute teacher who teaches in an Ohio school district for more than 120 days in a school year is entitled to a year of service credit in computing later salary awards.

A New York school district was not entitled to deduct salary received by a suspended teacher during the period of his suspension if it could be established that those earnings were supplemental rather than substitute earnings for service in the school district.[137]

A Pennsylvania teacher, properly dismissed for incompetence, was entitled to back pay during a medical absence that occurred prior to contract termination. Though he was absent for medical reasons up until the time of his dismissal, the appellate court found no intention to abandon his contract or terminate the contract agreement through a mutual rescission.[138]

A contract modification in which the employee agreed to go on sick leave until he could furnish proof of recovery from an emotional disturbance, in exchange for the superintendent's promise to withhold a notice of termination, was upheld by the Iowa Supreme Court despite the failure to ratify, which would have been evinced by the signature of the school board president.[139]

A provision of a state statute and an employee contract that referred to "other duties" in an Iowa principal's employment could extend to assignment as an attendance officer under a construction recognized by the Iowa Supreme Court. The court found no breach of contract in the school board's assignment and ruled the board's action did not exceed its discretionary authority.[140]

2.6b Administrative Regulations and State Statutory Provisions

State law frequently makes provision for differential pay, equal to the teacher's salary minus the salary of a substitute, when a teacher is absent for administratively approved or other justifiable reason. The Oklahoma Supreme Court has ruled that a school district may properly deduct the differential even when no substitute is actually hired.[141] In a California appellate court decision, it has been ruled that the entitlement to the pay differential is a separate entitlement in each school year.[142]

---

137. Hawley v. South Orangetown Cent. School Dist., 469 N.Y.S.2d 457 (N.Y. App. Div. 1983).

138. Bruckner v. Lancaster Cty. Area Voc.-Tech., 467 A.2d 432 (Pa. Commw. Ct. 1983).

139. Smith v. Fort Madison Commun. School Dist., 334 N.W.2d 701 (Iowa 1983).

140. Gere v. Council Bluffs Commun. School Dist., 334 N.W.2d 307 (Iowa 1983). Thomas v. Board of Educ., 453 N.E.2d 150 (Ill. App. Ct. 1983). An Illinois school board may reasonably require teachers to submit typed master copies of their examinations for approval and duplication.

141. Earnest v. School Bd. of Indep. Dist. No. 16, 666 P.2d 1287 (Okla. 1983).

142. California Teachers' Ass'n v. Governing Bd. of Gustine, 193 Cal. Rptr. 650 (Cal. Ct. App. 1983).

In adopting guidelines for salary increments based on education credit for professional improvement, the Louisiana Educational Employees Professional Improvement Committee exceeded its authority by establishing standards that were more stringent than those contained in the state statutory provision.[143]

Contract cancellation of a permanent teacher under an indefinite contract, which occurred between terms during the summer, would not become effective until the end of the following academic year term under Indiana law. A school district's claim that the state statute was intended to apply only to contract cancellations during the progress of the school year was denied by an Indiana appeals court.[144]

A probationary teacher who sought reinstatement and an award of attorney's fees was not successful in establishing a violation of the Oregon teacher's evaluation statute. Though the teacher received no evaluation of her performance consistent with the statutory requirements, an Oregon appellate court held the district had no obligation to evaluate the teacher under the statute as the statute was not incorporated by reference into the employment contract.[145]

Despite the school district's failure to properly serve notices of nonrenewal as required by a negotiated contract, the Kansas Supreme Court upheld the propriety of nonrenewal notices where the notices were served on or before the April 15 date specified under Kansas continuing contract statute. The negotiated contract provision was void as in conflict with the statutory notice requirement.[146]

An Indiana school board had the requisite authority to hire a teacher as a "permanent substitute" and was not required to hire her as a temporary teacher under Indiana statute law, despite a statutory wording that specified that a "temporary teacher's contract shall be used only for employing a teacher." In this instance, the appellate court ruled that the word "shall" was a term of limitation, not of mandate.[147]

California makes statutory provision for automatic resignation when an employee is absent without leave for five consecutive working days. In confining this statute to cases in which the absence is admitted, a California appeals court noted that it would be a denial of due process to permit the statutory presumption where an employee presented a factual dispute regarding authority for the absence.[148]

---

143. Deshotels v. State Professional Improvement Comm., 430 So. 2d 1198 (La. Ct. App. 1983).
144. Blue River Valley School Corp. v. Renfro, 446 N.E.2d 1364 (Ind. Ct. App. 1983).
145. Smith v. School Dist. No. 45, 666 P.2d 1345 (Or. Ct. App. 1983).
146. Ottawa Educ. Ass'n v. Unified School Dist. No. 290, 666 P.2d 680 (Kan. 1983).
147. Paul v. Metropolitan School Dist., 455 N.E.2d 411 (Ind. Ct. App. 1983).
148. Zike v. State Personnel Bd., 193 Cal. Rptr. 766 (Cal. Ct. App. 1983).

A California appellate court has resolved an apparent conflict in statutory provisions by concluding that a substitute teacher hired to replace a certified employee on leave has no right to reemployment preference when a regular teacher leaves the district.[149]

2.7 TENURE

2.7a Probationary Period

An Iowa teacher could not claim tenure by virtue of fulfilling statutory requirements for the probationary period while employed as a part-time tutor for a single student. The teacher was terminated following a reduction in force, but sought additional due process protection based on a claim that she had fulfilled the probationary period and possessed tenure rights. The court did not recognize her employment as qualifying her for statutory tenure rights and sustained the school board's determination not to process her notice of appeal of termination.[150]

The Idaho Supreme Court has held that a first-year probationary teacher has no right to a second year of probationary employment simply because nonrenewal was related to performance-based deficiencies in relationships with students and lack of classroom control.[151] Similarly, a Nebraska probationary teacher is not entitled to those termination and rehiring benefits enjoyed by tenured teachers and may not assert a preferred right to reemployment.[152]

A Massachusetts teacher who met the tenure requirement for three consecutive years of probationary employment was reemployed on a full-time basis in November of the following year. The Supreme Judicial Court of Massachusetts ruled that, having met the requirement of three consecutive years of employment, the rehiring in November satisfied the statutory requirement for award of tenure.[153]

The New York Court of Appeals has upheld an interpretation by the commissioner of education that would allow credit toward tenure for satisfactory substitute service where such service was rendered prior to the commencement of the first of a statutorily mandated three years of probationary service.[154]

---

149. Taylor, *supra* note 125.
150. Stafford v. Valley Commun. School Dist., 328 N.W.2d 323 (Iowa 1983).
151. Knudson v. Boundary Cty. School Dist., 656 P.2d 753 (Idaho 1983).
152. Roth v. School Dist. of Scottsbluff, 330 N.W.2d 488 (Neb. 1983).
153. Ripley v. School Comm. of Norwood, 451 N.E.2d 721 (Mass. 1983).
154. Robins v. Blaney, 465 N.Y.S.2d 868 (N.Y. 1983).

2.7b Tenure by Default or Acquiescence

A school district's business manager successfully established that her position came within the protection of a South Dakota statute granting continuing contract status to "other administrative employees." As a consequence, the employee could claim that the district's failure to provide adequate notice of termination constituted a renewal of her contract.[155]

A New York guidance counselor successfully contested a school district decision to nonrenew by arguing that her employment was in a probationary tenure-earning status rather than a half-time substitute. A New York appellate court awarded reinstatement and back pay on the grounds that the counselor had achieved tenure by estoppel following two years of probationary service.[156]

A school board's failure to notify the state tenure commission that the board intended to place a probationary teacher on a third year of probationary status resulted in the teacher's receipt of tenured status at the end of his second year of employment, despite board notice to the contrary.[157]

A Montana school psychologist was held to have earned tenure under a construction of the teacher tenure law prior to the amendment to the statute that excludes tenure-earning status for school psychologists. Additional evidence of the school district's intent to utilize the employee in a manner consistent with tenure status was a requirement within the employment contract that the psychologist hold a valid teacher certificate rather than a specialist certificate.[158]

A guidance counselor employed under a federal grant at a career development center did not acquire tenure prior to the time her position was abolished due to program termination, because she did not serve within the New York school system.[159] In another New York case, an acting principal could not acquire tenure by estoppel by arguing that her termination on the final day of her two-year probationary period was not in compliance with New York statutory standards.[160]

Teachers who were given adequate notice of the nontenured status of positions as occupational education instructors in a daytime adult learning program were held to have waived any claim to tenure and

155. Weltz v. Board of Educ. of Scotland, 329 N.W.2d 131 (S.D. 1983).
156. Sapphire v. Board of Educ., 466 N.Y.S.2d 439 (N.Y. App. Div. 1983).
157. Davis v. Board of Educ. of Harrison Commun. School, 342 N.W.2d 528 (Mich. Ct. App. 1983). *See* Slocum v. Littlefield Pub. Schools, 338 N.W.2d 907 (Mich. Ct. App. 1983). Letter sent to State Tenure Commission met required notice of teacher's third-year probationary status.
158. Harris v. Bauer, 672 P.2d 26 (Mont. 1983).
159. Connell v. Board of Educ. of City School Dist., 465 N.Y.S.2d 106 (N.Y. Sup. Ct. 1983).
160. Taylor v. Berberian, 446 N.Y.S.2d 336 (N.Y. App. Div. 1983).

could be terminated for budgetary reasons. Adequacy of notice was implied from a letter the teacher received, which did not contain a clause specifying that the position was tenure earning.[161]

A local district provision granting administrators contract renewal absent inadequate job performance was viewed by a California appellate court as granting a form of tenure that was preempted by provisions of the state education code. The code provided that tenure may be acquired only in the position of classroom teacher. A former principal, reassigned as a classroom teacher, could not rely on the local district provision as a basis for an expectancy of continued employment as a principal.[162]

A tenured high school principal, involuntarily transferred to the position of junior high school principal, was successful in challenging the transfer as arbitrary and capricious and violative of New York tenure statutes guaranteeing the administrator a right not to be assigned outside his tenure area without consent.[163]

A New York teacher who lost his job in a tenure area of trade electronics when the school board abolished positions in that area due to a reduction in force was entitled to a hearing to determine whether he acquired tenure in the technical electronics area as a result of the nature of teaching he did in the trade electronics area.[164] Similarly, New York teachers who were formerly employed by a board of cooperative educational services were accorded school district employment rights with no change in tenure status when the local district took over operation of the cooperative's services.[165]

No statutory or de facto tenure could be claimed by Illinois physical education teachers who kept teaching jobs but were not reemployed as head coaches of their high school athletic teams. Further, a statement by board members that a change in coaches would be good for the athletic program was not so stigmatizing as to violate liberty.[166]

2.7c Tenure Status

A teacher who, subsequent to attaining tenure, is promoted to a position as "attendance supervisor" does not lose tenure status under

---

161. Kelland v. Commissioner of Educ., 466 N.Y.S.2d 838 (N.Y. App. Div. 1983).
162. LaBelle v. San Francisco Unified School Dist., 189 Cal. Rptr. 530 (Cal. Ct. App. 1983).
163. Bell v. Board of Educ., 468 N.Y.S.2d 85 (N.Y. App. Div. 1983). *But see* Greenspan v. Dutchess Cty. Bd. of Coop. Educ. Servs., 466 N.Y.S.2d 430 (N.Y. App. Div. 1983). Administrative and supervisory appointments do not come within the protection of "tenure areas" for a professional educator under New York law.
164. Bloom v. Board of Coop. Educ. Servs., 463 N.Y.S.2d 531 (N.Y. App. Div. 1983).
165. Buenzow v. Lewiston-Porter Cent. School Dist., 458 N.Y.S.2d 841 (N.Y. Sup. Ct. 1983).
166. Smith v. Board of Educ. of Urbana, 708 F.2d 258 (7th Cir. 1983).

the provisions of the Alabama school code.[167] However, a New York teacher could not claim tenure in the separate area of remedial reading when her tenure status had been established in an elementary reading area.[168]

In the absence of a current employment contract creating a right to tenure, school administrators in Michigan were governed by the terms of original employment agreements that excluded tenure. The Michigan Supreme Court was unwilling to hold that the school administrators had acquired tenure by continuing to work without contracts after the expiration of their original written agreements.[169]

A school bus driver has no statutory or contractual right to tenure in the opinion of a New York appellate court. As a consequence, the driver could claim no right to a hearing solely because her position was classified as "permanent."[170]

2.8 CERTIFICATION

2.8a Certification Standards

Following a board of examiner's decision denying a principal's license to an applicant with experience as a "career education coordinator," the applicant challenged the board's determination that her experience did not meet the requirement for "full-time supervisory and/or administrative experience" required to qualify for the license. The New York Commissioner of Education sustained the board's decision and a judicial inquiry was requested to determine whether the commissioner's determination was arbitrary, capricious, or lacked a rational basis. In finding for the commissioner and dismissing the education coordinator's claim, the New York appellate court acknowledged a limited scope of judicial review over decisions related to certification and licensure requirements and affirmed the view that these matters are presumptively within the discretion of boards and state officers.[171]

A New York teacher sought a certificate in elementary education retroactive to 1979 on the grounds that his prior teaching experience satisfied state department certification requirements for supervised

---

167. *Ex Parte* Alabama State Tenure Comm'n, 430 So. 2d 880 (Ala. 1983). *See also* Smith v. Alabama State Tenure Comm'n, 430 So. 2d 877 (Ala. Civ. App. 1983).
168. Horowitz v. Board of Educ., East Ramapo Cent. School Dist., 465 N.Y.S.2d 67 (N.Y. App. Div. 1983).
169. Smiley v. Grand Blanc Bd. of Educ., 330 N.W.2d 416 (Mich. 1982).
170. Vorhis v. Warwick Valley Cent. School Dist., 459 N.Y.S.2d 325 (N.Y. App. Div. 1983).
171. De Bellis v. Commissioner of Educ., 464 N.Y.S.2d 259 (N.Y. App. Div. 1983).

student teaching. Without consideration on the merits, the New York appellate court affirmed the trial court's determination dismissing the action on the ground of untimeliness.[172]

A former Pennsylvania school administrator and teacher whose certification had been revoked following conviction of a crime involving moral turpitude petitioned for reinstatement from the Pennsylvania Secretary of Education. The teacher was granted a temporary teaching certificate and the secretary made reinstatement of other certificates contingent on fulfillment of experience. On appeal of this decision, the Pennsylvania Commonwealth Court ruled that there was no abuse of discretion in compelling the experience requirement, particularly since the petitioner had been absent from any teaching or administrative duties for over three years, a part of which time he had been in prison.[173]

2.8b Decertification, Revocation, or Suspension

A Pennsylvania school board acted properly in terminating a teacher for failure to obtain recertification prior to the expiration of her interim teaching certificate. Procedural protections normally provided to a certified teacher did not apply to the teacher since the date her certificate expired, rather than the date she obtained recertification, controlled her standing.[174]

A New York appellate court has held the certificate revocation of a teacher's license void as arbitrary and unreasonable in light of evidence the board of education failed to adequately specify the reason for revocation and did not provide timely notice to the teacher that she did not meet minimum licensing requirements.[175]

---

172. Smith v. Ambach, 460 N.Y.S.2d 839 (N.Y. App. Div. 1983).
173. Homer v. Commissioner, Dep't of Educ., 458 A.2d 1059 (Pa. Commw. Ct. 1983).
174. Occhipinti v. Board of School Dirs. of Old Forge, 464 A.2d 631 (Pa. Commw. Ct. 1983).
175. Novod v. Board of Examiners, 461 N.Y.S.2d 403 (N.Y. App. Div. 1983).